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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

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MARKEL AMERICAN INSURANCE COMPANY,)	Case No. 07-CV-5749 SC
Plaintiffs,)	REPLY BRIEF OF PACIFIC ASIAN ENTERPRISES IN SUPPORT OF ITS MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
v.)	
PACIFIC ASIAN ENTERPRISES, INC., a California corporation; LEVITON MANUFATURING CO., INC., a Delaware corporation; HUBBELL INCORPORATED, a Connecticut corporation; and DOES 1 - 100, inclusive)	Date: March 7, 2008 Time: 10:00 a.m. Place: Courtroom 1 Judge: Hon. Samuel Conti
Defendants.)	

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I. Plaintiff's Opposition Admits that Its Complaint for Strict Products Liability and Negligence Fails as A Matter of Law.

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Plaintiff Markel American Insurance Company's ("MARKEL") opposition does not challenge Pacific Asian Enterprises' ("PAE") primary contention – that a vessel manufacturer may not be held liable under either strict liability or negligence theories for damage to a vessel itself. See East River S.S. Corp. V. Transamerica Delaval, 476 U.S. 871 (1986). Instead, MARKEL attempts to circumvent the holding of East River by asking the Court to construe its complaint as alleging damage to "other property" not covered by the East River rule. However, MARKEL's own pleadings and motion papers confirm that its complaint is predicated on

1 damage to the *Boundless Grace*.

2 MARKEL's opposition points out that "the complaint . . . alleges that the **vessel** was
 3 severely damaged including damages to finishes, furnishings and personal property." Opposition
 4 at 2: 18-19 (emphasis added). In other words, the opposition itself recognizes that the strict
 5 liability and negligence claims are for damage to the vessel. Indeed, paragraph 12 of
 6 MARKEL's complaint alleges that the "*Boundless Grace* was severely damaged in an engine
 7 room fire, including, but not limited to heat, smoke, and water damage to its machinery space,
 8 generator, engine and mechanical systems, cabin, wheelhouse, electrical system, fuel system,
 9 plumbing system, insulation, fittings, finishes, furnishings, and appliances, as well as personal
 10 property." Complaint at ¶ 12. As with the Opposition, the complaint is consistent in alleging
 11 damage to the vessel *Boundless Grace* for which plaintiff cannot recover from PAE in tort.
 12 Complaint at ¶¶ 12, 13, 21, 31.

13 Even did plaintiff's Complaint not consistently allege damage to the vessel itself as the
 14 basis for the lawsuit, the arguments raised by its opposition would be groundless. In Saratoga
 15 Fishing Company v. J.M Martinac & Company and Marco Seattle, Inc., 520 U.S. 875 (1997),
 16 Justice Breyer, writing for the Court, concluded that equipment added to a vessel post-
 17 manufacture by an initial purchaser could constitute "other property" for the purposes of the East
 18 River rule. Here, however, the complaint alleges damage to the *Boundless Grace*. While
 19 MARKEL's opposition cites to the furnishings or finishes as examples of "other property," the
 20 Complaint itself does not allege that MARKEL's insured added any of the furnishings or finishes
 21 to the *Boundless Grace* after it was sold, or that they were not part and parcel of the vessel as
 22 purchased. Instead, the complaint alleges that PAE is strictly liable for the damage to the
 23 *Boundless Grace* itself, including damage to its finishes and furnishings, among other things.

24 Moreover, plaintiff is subrogating against PAE on the basis of payments it made to its
 25 insured, the purchaser of the vessel. Complaint at ¶ 14. MARKEL alleges that (1) it issued the
 26 "Jackline" policy covering the *Boundless Grace* and (2) that as a result of the fire damage to the
 27 *Boundless Grace* it was obligated to pay its insured for the "protection, repair, and loss of use of
 28 the vessel . . ." Complaint at ¶¶ 9, 13. As a subrogated insurer, MARKEL's damages flow from

1 its obligation to pay its insured per the terms of its policy. The policy, as alleged in the
 2 complaint, covers the *Boundless Grace*, and the payments MARKEL alleges it made arise out of
 3 damage to the vessel. To the extent that MARKEL is asserting that the tort causes of action
 4 apply only to property *other than the vessel*, it appears that it has no subrogation claim under the
 5 terms of the policy it chose to plead in its complaint.

6 As a vessel manufacturer alleged to be in privity of contract with MARKEL's insured,
 7 PAE does not stand in the same position as alleged component manufacturers such as defendants
 8 HUBBELL and LEVITON. PAE's relationship with MARKEL's insured is contractual in
 9 nature, and MARKEL cannot state a cause of action in tort against PAE for damage to the
 10 product itself, namely the *Boundless Grace*. To the extent that MARKEL intends its tort
 11 causes of action against PAE to apply only to after-market property aboard the
 12 *Boundless Grace*, it should be required to amend its complaint to so state, and to allege
 13 that it was required by the terms of its insurance policy to pay for damage to such
 14 property.

15 **II. MARKEL's Boilerplate Warranty Allegations Against All Defendants
 16 Are Insufficient to State a Claim for Breach of Warranty.**

17 Plaintiff's complaint for breach of warranty alleges identical boiler-plate warranty
 18 allegations against each of the three named defendants. It does not (1) distinguish
 19 between the defendants' respective products, (2) distinguish between the defendants'
 20 alleged warranty allegations, (3) identify the source of any of the alleged warranties, or
 21 (4) allege with specificity any facts concerning the making of the warranty or the nature
 22 of the breach. As such, the plaintiff's complaint fails to state a cause of action with
 23 sufficient particularity to survive a motion to dismiss. See McGlinch v. Shell Chem.
 24 Co., 845 F.2d 802, 810 (9th Cir. 1988) ("conclusory allegations without more are
 25 insufficient to defeat a motion to dismiss for failure to state a claim); Bell Atl. Corp. v.
 26 Twombly, 127 S. Ct. 1955, 1965 (U.S. 2007) ("a plaintiff's obligation to provide the
 27 grounds of his entitle[ment] to relief requires more than labels and conclusions, and a
 28 formulaic recitation of the elements of a cause of action will not do . . .")

1 MARKEL's opposition cites no case law or other authority in support of its
 2 contention that the rote allegations of its complaint alleging breach of warranty are
 3 sufficient to survive a motion to dismiss. Instead, MARKEL questions whether counsel
 4 for PAE have read paragraphs 23 through 26 of its complaint. Those paragraphs allege
 5 identical ambiguous conduct by every defendant, allege legal conclusions ("defective"
 6 and "dangerous") concerning the unnamed "products," and finally allege proximate cause
 7 and injury in an amount just sufficient to invoke the diversity jurisdiction of this Court.
 8 They are, in fact, precisely the "conclusory allegations" and "formulaic recitation of the
 9 elements of a cause of action" cautioned against in the aforementioned case law. As
 10 such, MARKEL's complaint should be dismissed. In the event MARKEL is granted
 11 leave to amend, PAE requests the Court order MARKEL to identify the particular source
 12 and language of the warranty it alleges PAE made to its insured.

13 **III. Conclusion.**

14 MARKEL alleges a contractual relationship between its insured and PAE. Its
 15 complaint then alleges three causes of action, two of which sound in tort rather than
 16 contract, and the third of which refuses to specify the contractual source and nature of the
 17 warranty it claims was made by PAE to its insured. As a subrogated insurer, MARKEL is
 18 bound to the contractual position of its insured. Its artful attempt to avoid the contract it
 19 alleges its insured made with PAE for the sale of the vessel should not withstand a motion
 20 to dismiss. To the extent that MARKEL's insured and PAE contracted for the sale of the
 21 *Boundless Grace*, their respective rights and obligations are governed by that contract.
 22 PAE should not have to defend against claims for damage to the vessel that fall outside
 23 the terms of the agreement between itself and MARKEL's insured. PAE respectively
 24 requests this Court to dismiss MARKEL's claims against PAE.

25 Dated: February 21, 2008

 GIBSON ROBB & LINDH LLP

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 By: S/ JOSHUA A. SOUTHWICK
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 Attorneys for Defendant

 PACIFIC ASIAN ENTERPRISES, INC.